

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 KA 2074

STATE OF LOUISIANA

VERSUS

ANTHONY D. RICHARD

Judgment Rendered:

SEP 15 2006

**Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 03-96-0447**

Honorable Todd Hernandez, Judge Presiding

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**Attorneys for Appellee,
State of Louisiana**

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**Attorneys for Defendant/Appellant,
Anthony D. Richard**

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Marrero, LA**

BEFORE: CARTER, C. J., WHIPPLE AND McDONALD, JJ.

WHIPPLE, J.

Defendant, Anthony Richard, was originally charged by bill of information with one count of attempted second degree murder, a violation of LSA-R.S. 14:27 and 30.1, and one count of illegal use of a weapon, a violation of LSA-R.S. 14:94. Pursuant to a plea agreement, defendant pled guilty to one count of illegal use of a weapon and the State dropped the attempted second degree murder charge.¹ On September 20, 1996, the trial court sentenced defendant to seven years at hard labor with credit for time served and suspended all but three years, with this sentence to be served concurrently with any other sentence he was serving.

On October 27, 1999, defendant's probation was revoked and the original sentence of seven years was reimposed, to run concurrently with sentences in the other cases. In State ex rel. Richard v. State, 2004-2225 (La. App. 1st Cir. 1/14/05) (unpublished), this Court reversed the seven-year sentence and remanded the matter to the trial court for resentencing.

The trial court subsequently resentenced defendant to two years at hard labor, with credit for time served from the date of arrest to bond, to run concurrently with his other sentences.

We affirm his sentence.

FACTS

On July 24, 1995, defendant was involved in a fistfight with Marcus Roane. Defendant left the scene and returned with a weapon. Defendant pursued Roane into a house, where he fired the weapon. Defendant then left the house and fired the weapon into the residence multiple times. Although there were several people in the house, no one was injured.

¹On the same date defendant entered his guilty plea in the present case, he also entered guilty pleas to one count of first degree robbery and one count of illegal possession of stolen things.

APPOINTMENT OF COUNSEL

In his first pro se argument, defendant alleges the trial court erred in refusing to appoint counsel to represent him during his resentencing. The transcript of the resentencing indicates that defendant was represented by an attorney at the resentencing and was allowed to confer with his attorney, who was appointed to explain the nature of the proceedings and to represent defendant. Defense counsel explained to defendant that his sentence for this conviction was being reduced from seven years to two years. After conferring with his counsel, defendant specifically indicated that he understood the proceedings.

Because defendant was accompanied and represented by counsel, this assignment of error is without merit.

DEFENDANT'S SECOND PRO SE ARGUMENT

In his second pro se argument, defendant argues he served his sentence and cannot be sentenced again. Defendant provides unverified dates and reasons for his probation revocation. However, the present appeal concerns only the issue of whether defendant received an excessive sentence when the trial court resentenced him pursuant to an order by this Court. To the extent that the defendant complains he may have already served two years for this conviction, we note that when he was resentenced, he was specifically given credit for time served. Therefore, defendant's complaint appears to pertain to the calculation of his prison term and the failure to give him credit for time served. At such, the Corrections Administrative Remedy Procedure (CARP), LSA-R.S. 15:1171-1179, is the exclusive remedy by which an offender may challenge the time computations of the Department of Public Safety and Corrections. Madison v. Ward, 2000-2842, p. 7 (La. App. 1st Cir. 7/3/02), 825 So. 2d 1245, 1252 (en banc).

This assignment of error is also without merit.

EXCESSIVE SENTENCE

Through his counseled assignment of error and his third pro se argument, defendant argues that the trial court imposed an excessive sentence. In his pro se brief, defendant further maintains that his counsel was ineffective in failing to object to his sentence.

A review of the record indicates that defense counsel did not make a motion to reconsider sentence nor did she object to the sentence. However, defendant himself objected to the sentence by stating that he “wasn’t going to take it.”

Under LSA-C.Cr.P. art. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. The defendant, therefore, is procedurally barred from having this assignment of error reviewed. State v. Scott, 2005-0325, p. 4 (La. App. 1st Cir. 11/4/05), 927 So. 2d 441, 444. However, in an abundance of caution, we will examine the sentence because defendant did make some objection to the sentence and because of the necessity to examine the sentence as part of the ineffective counsel issue in defendant’s third pro se argument. See State v. Bickham, 98-1839, p. 7 (La. App. 1st Cir. 6/25/99), 739 So. 2d 887, 891-892.

Although a claim of ineffective assistance of counsel is normally raised in an application for post conviction relief, this Court may address the merits of the claim when the record on appeal is sufficient. State v. Scott, 2005-0325 at p. 4, 927 So. 2d at 445. In this instance, the record is sufficient, and we will therefore address the defendant’s claim.

In Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry is whether counsel's assistance was reasonable under the circumstances. In making the determination of whether the specific error resulted in an improper sentence, the inquiry must be directed to whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. State v. Scott, 2005-0325 at p. 5, 927 So. 2d at 445.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing a sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. Although a sentence falls within statutory limits, it may be excessive. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. The trial court has great discretion in imposing a sentence within the statutory limits, and such a

sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. State v. Scott, 2005-0325 at p. 5, 927 So. 2d at 445.

The goal of LSA-C.Cr.P. art. 894.1 is the articulation of the factual basis for a sentence, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with LSA-C.Cr.P. art. 894.1. The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. State v. Scott, 2005-0325 at pp. 5-6, 927 So. 2d at 445-446.

The penalty for illegal use of weapons is a fine of not more than one thousand dollars, or imprisonment with or without hard labor for not more than two years, or both. LSA-R.S. 14:94(B). In the present case, the trial court sentenced defendant to the maximum prison term of two years at hard labor.

The factual basis set forth by the State at the Boykin hearing and other documents in the record indicate that defendant was involved in a fistfight with the victim. This fight subsided, and defendant left. However, defendant then retrieved a weapon, pursued the victim into a residence occupied by several other people, and fired the weapon at least once while inside the residence. Defendant then left the residence and fired the weapon multiple times into the residence.

Although defense counsel argues that the record fails to provide sufficient information about the offense to justify the maximum sentence, we disagree. Initially, we note defendant also was charged with attempted second degree murder for his actions in this incident and that this charge was dropped in exchange for his

guilty plea. Moreover, we note that defendant had an opportunity to walk away from the situation that erupted into the fistfight with the victim but did not do so. Instead, defendant retrieved a weapon and pursued the victim into a residence where several other people were present. Defendant fired this weapon while inside the residence and then again fired the weapon into the residence (from outside), placing multiple lives in danger. Despite defendant's flagrant disregard for the safety of the people who were in the residence, no one was injured.

Maximum sentences may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. State v. Price, 95-0997, pp. 6-7 (La. App. 1st Cir. 6/28/96), 677 So. 2d 705, 709.

Under the circumstances of this case, we cannot say the trial court imposed an excessive sentence. Defendant's actions clearly place him in the category of the worst offender.

Accordingly, defendant was not prejudiced by his counsel's failure to object or file a motion to reconsider sentence.

These assignments of error are likewise without merit.

SENTENCE AFFIRMED.